THE SUPREME COURT AND THE SHERMAN ANTI-TRUST ACT.

THE Act, passed by Congress July 2, 1890, and known as the Sherman Anti-Trust Act, has been in existence now for over a decade, and during that time has been frequently before the courts for construction. Numerous decisions upon it have been rendered by the United States Circuit Courts, the United States Circuit Courts of Appeals, and the United States Supreme Court, and while these decisions are by no means all of equal weight, yet they all are worth study as showing the growth of legal opinion. It will be impossible, however, in a single article, to review such a mass of authorities in any detail, and the aim of the present article is more restricted. It is proposed here simply to deal with the decisions upon the Act rendered by the United States Supreme Court, — those alone of final authority, — and to ascertain as accurately as may be, the scope of the Act in the light of such decisions. This inquiry may not be altogether untimely, inasmuch as such a knowledge is indispensable to a correct judgment upon the many propositions, now rife, in the guise of amendments of the Act, or changes even in the Constitution itself.[1]

The Act was framed under the commerce and territorial clauses of the Constitution, and in terms is very broad.

"SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .

"SECTION 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopo-

[1] See Attorney General Knox's recent speech, and the following amendment to the Constitution, proposed in Congress, but defeated for want of a two-thirds vote:

"SECTION 1. All powers conferred by this article shall extend to the several States, the Territories, the District of Columbia, and all Territories under the sovereignty and subject to the jurisdiction of the United States.

"SECTION 2. Congress shall have power to define, regulate, control, prohibit, or dissolve trusts, monopolies, or combinations, whether existing in the form of a corporation or otherwise.

"The several States may continue to exercise such power in any manner not in conflict with the laws of the United States.

"SECTION 3. Congress shall have power to enforce the provisions of this article by appropriate legislation."

lize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . .

"SECTION 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. . . ."

By a singular oversight, the provisions of section 2, in relation to "monopoly," were not extended to territorial trade or commerce, but were confined to interstate and foreign trade and commerce. Practically, however, the omission is immaterial, for the Supreme Court has held, that the words "combination in the form of trust or otherwise," used in section 1, mean a combination in any form whatever, whether of trust or otherwise, and a "monopoly," subject to the provisions of section 2, would therefore undoubtedly be similarly subject to the provisions of section 1. It could not escape as a corporation. The difficulty is not here. The great controversy has been, not that the Act insufficiently defined a trust, difficult as such a definition is, or that the evil aimed at was not otherwise adequately reached by the Act, but that the cases complained of were cases, not of *interstate* or *foreign* trade or commerce, but of *state* trade or commerce. The whole agitation turns upon this point. Indeed, the decisions of the Supreme Court upon the scope of the Act, aside from this trade or commerce feature of it, have been most liberal. For example, the Court has held:

1. That (as above stated) a "combination" in any form whatever, whether of a trust or otherwise, is within the provisions of section 1. United States *v.* Trans-Missouri Freight Association, 166 U. S. 290, 326.

2. That the Act is not confined to the necessaries of life. United States *v.* E. C. Knight Co., 156 U. S. 1, 12.

3. That the "monopoly" need not be a *complete* "monopoly." Ibid. 16.

4. That the Act applies to carriers by railroad. United States *v.* Trans-Missouri Freight Association, 166 U. S. 290; United States *v.* Joint Traffic Association, 171 U. S. 505.

5. That the words "in restraint of trade or commerce" have not their technical common law meaning, implying an *unreasonable*

"restraint of trade or commerce," but include *any* "restraint" *at all.* Ibid.

In the last ruling, it may be doubted whether the Supreme Court has not outstripped the plain intent of Congress. Mr. Hoar, the Chairman of the Senate Judiciary Committee, which reported the bill, said, on presenting it to the Senate: "We have affirmed *the old doctrine of the common law* in regard to all interstate and international commercial transactions."[1] And Mr. Edmunds, who was a member of the same Committee, and had a hand in the drafting of the measure, shortly after, added, in the course of debate: "We all felt it, and the committee, I think, unanimously, including my friend from Mississippi [Mr. George], thought that if we were really in earnest in wishing to strike at these evils broadly, in the first instance as a new line of legislation, we would frame a bill that should be clearly within our constitutional power, *that we should make its definition out of terms that were well known to the law already*, and would leave it to the courts in the first instance to say how far they could carry it or its definitions as applicable to each particular case as it might arise."[2] One inference only seems possible, namely, that Congress purposed declaring illegal, in respect of *interstate* trade and commerce, what was illegal at common law in respect of *state* trade and commerce. The Court, however, went further, and held that Congress meant not only contracts which were at common law *illegally* in restraint of trade, but contracts which were *legally* so. Also, that the statute thus construed was constitutional. No ruling could be broader.

So far, no complaint. Congress, however, is a body of limited, and not of general powers, and no law relating to interstate and foreign trade and commerce can exceed the specific grant to Congress in that behalf without being unconstitutional. The question, then, arises, What are the powers of Congress over interstate and foreign trade and commerce? Of course, its powers over territorial trade and commerce are as broad as those of the States over state trade and commerce, and no difficulty arises as to the scope of section 3 of the Act. The doubt concerns alone interstate and foreign trade and commerce and the provisions of sections 1 and 2, but is most important, as interstate and foreign trade and commerce, of course, form the chief bulk of the entire trade and commerce of the country.

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[1] Cong. Rec. xxi. pt. 4, p. 3146.

[2] Ibid. p. 3148.

Three decisions have been rendered by the Supreme Court upon this point, to wit:

(1) The Sugar Trust Case: United States *v.* E. C. Knight Co., 156 U. S. 1.

(2) The Livestock Exchange Cases: Hopkins *v.* United States, 171 U. S. 578; Anderson *v.* United States, 171 U. S. 604.

(3) The Iron Pipe Case: Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211.

(1) In the Sugar Trust Case the Supreme Court held that there was a distinction between "manufacturing" and "trade and commerce," and that, while operations affecting "manufacture" might also indirectly affect "trade and commerce," yet they did not directly do so, and therefore were not matters of federal jurisdiction. It must not be understood, however, that the Court went so far as to hold that because the Trust was a manufacturing concern, it was not therefore subject to the jurisdiction of Congress, to the extent that it took part in interstate and foreign trade and commerce. For example: If, in the words of section 2 of the statute, it were proved that the Sugar Trust had monopolized, or had attempted to monopolize, or had combined or conspired with any other person or persons to monopolize, any part of the trade or commerce among the several States, or with foreign nations, a case would be made out within the meaning of section 2, and the Sugar Trust, like any other person, would be subject to the provisions thereof. No attempt of this character was made in United States *v.* E. C. Knight Co. The only purpose of that suit was to prevent the amalgamation of certain competing refineries, and not to control their operations after amalgamation. This is as far as the decision goes, although an impression to the contrary has considerable popular support. See opinion:

"It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted. Aside from the provisions applicable where Congress might exercise municipal power, what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several

States or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; but this was no more than to say that trade and commerce served manufacture to fulfill its function. Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other States, and refined sugar was also forwarded by the companies to other States for sale. Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree. The subject-matter of the sale was shares of manufacturing stock, and the relief sought was the surrender of property which had already passed and the suppression of the alleged monopoly in manufacture by the restoration of the *status quo* before the transfers; yet the Act of Congress only authorized the Circuit Courts to proceed by way of preventing and restraining violations of the Act in respect of contracts, combinations, or conspiracies in restraint of interstate or international trade or commerce" (pp. 16, 17).

(2) In the Livestock Exchange Cases the Supreme Court held that the members of the Kansas City Livestock Exchange and the Traders' Livestock Exchange were not engaged in interstate or foreign trade or commerce, and that the by-laws of such Exchange, affecting the action of members, could not therefore be a regulation of such trade or commerce. In other words, to bring a case within the provisions of the Act, it is not sufficient to show that parties deal in articles of interstate trade or commerce, but it must be shown that the act complained of is an act in restriction of such trade or commerce. Hence, further, as the business of both Exchanges was not interstate or foreign trade or commerce, but state trade or commerce, whether the members of the Exchanges acted as commission merchants or as principals was immaterial.

(3) In the Iron Pipe Case there was an agreement between

various competing companies regulating the method of selling iron pipes throughout the country. The different companies were manufacturers of pipes, in the same manner as the sugar refineries were manufacturers of sugar, but the agreement here related to the method of disposing of the articles of manufacture, and not to the form of organization of the producer, and therefore, unlike the merger at issue in the Sugar Case, amounted to a regulation of interstate and foreign trade and commerce. An injunction was accordingly issued. See opinion:

"If dealers in any commodity agreed among themselves that any particular territory bounded by state lines should be furnished with such commodity by certain members only of the combination, and the others would abstain from business in that territory, would not such agreement be regarded as one in restraint of interstate trade? If the price of the commodity were thereby enhanced, (as it naturally would be,) the character of the agreement would be still more clearly one in restraint of trade. Is there any substantial difference where, by agreement among themselves, the parties choose one of their number to make a bid for the supply of the pipe for delivery in another State, and agree that all the other bids shall be for a larger sum, thus practically restricting all but the member agreed upon from any attempt to supply the demand for the pipe or to enter into competition for the business? Does not an agreement or combination of that kind restrain interstate trade, and when Congress has acted by the passage of a statute like the one under consideration, does not such a contract clearly violate that statute?

"As has frequently been said, interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different States, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale, and exchange of commodities. Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196–203; Kidd *v.* Pearson, 128 U. S. 1, 20. If, therefore, an agreement or combination directly restrains not alone the manufacture, but the purchase, sale or exchange of the manufactured commodity among the several States, it is brought within the provisions of the statute. The power to regulate such commerce, that is, the power to prescribe the rules by which it shall be governed, is vested in Congress, and when Congress has enacted a statute such as the one in question, any agreement or combination which directly operates, not alone upon the manufacture, but upon the sale, transportation, and delivery of an article of interstate commerce, by preventing or restricting its sale, etc., thereby regulates interstate commerce to that extent, and to the same extent trenches upon the power of the national legislature and violates the statute. We think it plain that this contract or combination effects that result." (pp. 241, 242.)

On this review of the decisions, it cannot be said that the Sherman Anti-Trust Act is ineffective by reason of constitutional limitations, because the Act has never received a full test. Suppose that a corporation monopolizes, or attempts to monopolize, the interstate, territorial or foreign trade or commerce in an article of merchandise, so as to exclude all competitors, can it be said that the Supreme Court has yet held that such corporation cannot be reached under the Act? Certainly there is no such doctrine in the Sugar Trust Case, and there is a contrary doctrine in the Iron Pipe Case. In the Sugar Trust Case the Court expressly says: "The object was manifestly private gain in the *manufacture* of the commodity, but not through the *control* of interstate or foreign commerce." See citation above. And in the Iron Pipe Case the Court says: "If, therefore, an agreement or combination directly restrains not alone the *manufacture*, but the *purchase*, *sale*, or *exchange* of the manufactured commodity among the several States, it is brought within the provisions of the statute." See citation above. When, therefore, the further fact is recalled that the Act embraces any contract, combination in the form of trust or otherwise, or conspiracy, in restraint (reasonable or unreasonable) of interstate, territorial, or foreign trade or commerce; also any monopoly of any part of such interstate or foreign trade or commerce, and any attempt to monopolize the same; that section 2 of the Act indubitably applies to all corporations, and that the words "combination in [the] form of trust or otherwise," in sections 1 and 3 of the Act, according to the decision in United States *v.* Trans-Missouri Freight Association, *supra*, embrace a combination *in any form*, and therefore presumably a corporation, — the conclusion seems inevitable, that very sweeping legislation is already upon the statute-books. Would it not be wiser, therefore, in so delicate a matter, before new legislation is undertaken, and surely before an amendment to the Constitution is submitted to the people, to adopt the President's recommendation as to an appropriation, and ascertain, first, what can be done under the present Act? As yet, there is no authoritative decision.

Several minor cases, perhaps, may be referred to as of collateral interest. For example: It has been held that a person making a contract with a company or organization falling within the provisions of the Act is bound by such contract, and cannot escape from its obligations. Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540. Also that the company or organization is equally

bound. Dickerman *v.* Northern Trust Co., 176 U. S. 181. But if the Act had specifically prohibited any remedy, *quære*, Whether the result would not have been different, so far, at least, as relates to interstate or foreign sales. The court, in Connolly *v.* Union Sewer Pipe Co., *supra*, said: "If the Act of Congress expressly authorized one who purchased property from a combination, organized in violation of its provisions, to plead, in defense of a suit for the price, the illegal character of the combination, that would present an entirely different question. *But the Act contains no such provision*" (p. 552).

Wm. F. Dana.